



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(JUDICIAL REVIEW AND CONSTITUTIONAL DIVISION)**

**MISC CIVIL APPLICATION NUMBER 354 OF 2013**

**IN THE MATTER OF: AN APPLICATION SEEKING  
JUDICIAL REVIEW ORDERS OF PROHIBITION AND  
MANDAMUS**

**AND**

**IN THE MATTER OF: NATIONAL POLICE SERVICE  
ACT, CAP 1A OF 2011, LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE UNLAWFUL SEIZURE  
AND HOLDING OF MOTOR VEHICLE REGISTRATION  
NUMBER KBM 193X MERCEDES BENZ BY THE  
DIVISIONAL CRIMINAL INVESTIGATION OFFICER  
(DCIO) GIGIRI POLICE STATION**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE INSPECTOR GENERAL OF POLICE**

**THROUGH THE DIVISIONAL CRIMINAL**

**INVESTIGATION OFFICER (DCIO)**

**GIGIRI POLICE STATION.....RESPONDENT**

**EX PARTE APPLICANT: TEAM CONSTRUCTION LIMITED**

**JUDGEMENT**

1. By a Notice of Motion dated 16<sup>th</sup> October, 2013, the *ex parte* applicant herein, **Team Construction Limited**, seeks the following orders:
1. **An order of prohibition directed to the Inspector General of Police and/or his subordinate officers and/or any other person acting under or through him from continuing to hold**

and/or confiscate the motor vehicle registration number KBM 193X, Mercedes Benz without any lawful cause.

2. An order of Mandamus directed to the Inspector General of Police and/or his subordinate officers and/or any other person acting under or through him compelling him to forthwith release motor vehicle registration number KBM 193X, Mercedes Benz to the ex-parte Applicant.

### Ex Parte Applicant's Case

2. The said application is supported by a verifying affidavit sworn by **Bernard Kibati**, a director of the ex parte applicant on 10<sup>th</sup> October, 2013.
3. According to the deponent, sometime on or about 8<sup>th</sup> April 2013 one **Stephen Mose** of **Mose and Mose Advocates**, the owner of motor vehicle registration number KBM 193X (hereinafter referred to as the suit motor vehicle), instructed the firm of **Ndege & Company Advocates** to collect and dispose of motor vehicle registration number KBM 193X which was being held at Gigiri Police Station and pursuant thereto, the said **Stephen Mose** released the original log book for the suit motor vehicle together with the said letter.
4. The firm of **Ndege & Company Advocates** instructed and contracted my firm of **Kibati and Associates Advocates** to collect and dispose of the said vehicle on their behalf and armed with the said instructions and documents, the deponent's firm instructed the firm of **Messrs Gallant Auctioneers Limited** to collect and dispose the vehicle on its behalf. However, when Messrs Gallant Auctioneers went to Gigiri Police station where the vehicle had been held, they have up to date Police failed and/or refused to release the said vehicle to them despite numerous visits to the Police station, protestations and written communication.
5. According to the deponent, the Police have neither proffered any reason why they are holding on to the vehicle despite there being no evidence of any criminal activity involving the suit motor vehicle nor have they charged anyone with any criminal act with regard to the suit motor vehicle.
6. In the deponent's view, the Police's actions of holding the suit motor vehicle without any legal basis and/or just cause continue to disenfranchise the vehicle's owner and the Applicant as the purposes of the intended sale is for the owner to settle certain moneys owned to the Applicant. Further, the continued detention of the vehicle with no legal basis or evidence of criminal activity involving the vehicle or the charging of anyone with any known criminal act is an abuse of the Police powers and an affront to the deponent's civil liberties and right to own property, is unlawful, illegal and abuse of due process.
7. It was deposed that the owner of the suit motor vehicle stand to suffer irreparable loss by this continued unlawful detention of the motor vehicle as the same stands to be held indefinitely and is likely to be vandalized and to fall into a state of disrepair as a result of continued disuse and exposure to the elements yet the Police's decision to detain the vehicle without any proof or evidence of any criminal activity involving the vehicle is unlawful and ultra vires and there exists sufficient and indisputable proof and evidence that the owner of the vehicle has authorized its release.
8. To the deponent, the Police are abusing their powers to the Applicant's great detriment and that of the owner of the subject motor vehicle and have descended into the arena of being complainant, judge and jury by wrongfully seizing and holding the subject vehicle which action is unlawful, illegal and an abuse of the due process of the law and the Applicant is greatly apprehensive that the police may at any time release the subject motor vehicle to third parties unless suitable orders are issued by the court barring such action pending the just conclusion of this matter.

### Respondent's Case

9. On behalf of the Respondent, a Replying Affidavit was filed sworn by **Peter Mungai Wanyoike**, the Divisional Criminal Investigating Officer – Gigiri Police Station on 26<sup>th</sup> November, 2013.
10. According to the deponent, the suit motor vehicle was detained in the month of August 2012 having been impounded from one **Moses Ndege** who is accused of defrauding **Ams Propelier** Kshs. 48 million which sum was the same amount of money he used to buy the suit motor vehicle and hence the proceeds of the stolen money. According to the deponent, during the time the motor

- vehicle was impounded, the owner **Moses Ndege** alleged that he did have the log book and that he would produce it later. The deponent could not however tell whether the owner ever transacted with the applicant or whether the owner is one of the accused persons.
11. To the deponent, they are no longer the investigating officers as the case file was handed over to one **Mr. Donald Kipkorir** Advocate who was appointed and gazetted by the Director of Public Prosecutions as a Prosecutor in the said case. However, while the case was proceeding, the accused went to the High Court and sought a Constitutional Interpretation for some issues and the High Court decision is still pending.
  12. Owing to the fact that the case file was handed over to **Mr. Donald Kipkorir** Advocate he is the right person to communicate with the future for the position of the case. To him, the Attorney General should no longer be a party in these proceedings and should be exempted as the case is now being handled by the D.P.P (Director of Public Prosecutions) hence the application is not meritorious and should be dismissed.

### **Applicant's submissions**

13. On behalf of the applicant, it was submitted that the issues between the owner of the suit motor vehicle and the ex parte applicant are of a civil nature as they involve the recovery of money debt hence the Respondent is using his authority to unduly frustrate the ex parte applicant's effort to enforce its civil rights.
14. Without bringing any criminal charges against anyone, it was submitted that it is within the owner's rights to direct that the suit vehicle be released to the ex parte applicant herein for the purpose of offsetting the debt hence the Respondent has no basis for denying the applicant access to and possession of the suit vehicle.
15. To the applicant the public has legitimate expectation that the Respondent will at all times comply with all the requirements of the law in the conduct of his duties and where the Respondent' fails to do so, the owner of the vehicle and the ex parte applicant should not be made to suffer for the Respondent's failures.
16. According to the applicant the claim that the suit vehicle was bought from the proceeds of a crime have no basis. Without documents in support of the Respondent's claim, it was submitted it can only be assumed that any such documents would have been prejudicial to the Respondent's case.

### **Determinations**

17. The applicant as indicated hereinabove is Team Construction Limited. The suit vehicle, however, is alleged to be the property of **Stephen Mose of Mose and Mose Advocates**. The Registration Book or the Logbook as it is popularly known bears the name of **Aristocars Ltd**. The firm to whom instructions were given to collect and dispose of the suit motor vehicle was **Ndege & Company Advocates** who in turn instructed and contracted the firm of **Kibati and Associates Advocates** to collect and dispose of the suit vehicle on their behalf.
18. One would have expected that this application would have been brought in the name of the person claiming to be the registered owner of the motor vehicle instead of his agents.
19. To make matters worse, the applicant herein is neither the person claiming ownership of the suit vehicle nor any of his purported agents. To the contrary the applicant is a limited liability company whose director is an Advocate in the firm in which one of the said agents, **Bernard Kibati**, seems to be a partner.
20. The role of the applicant in this whole transaction is therefore not explained and is unclear to this Court. Its interest in the suit vehicle is shrouded in mystery. In my view it would be a travesty of justice to order the release of the suit vehicle to a person or entity which has not shown what if any interest it has in the subject matter.
21. In the foregoing premises I am not satisfied that the applicant in the present application deserves to be granted the orders sought in this application.

### **Order**

21. In the result the Notice of Motion dated 16<sup>th</sup> October, 2013 fails and is dismissed but with no

order as to costs.

22. However, the applicant will bear the storage charges of the suit vehicle payable and due to Leakeys Storage, if any. The motor vehicle to be released to the custody the Officer in Charge, Gigiri Police Station, for safe custody until otherwise released or ordered.

**Dated at Nairobi this 3<sup>rd</sup> day of March 2014**

**G V ODUNGA**

**JUDGE**

*Delivered in the presence of Mr Makumi for Miss Mwangi for the Applicant.*